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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JAZMIN BARRERA et al., **Plaintiffs and Appellants,** **v.** **HARRY E. JENSEN III et al.,** **Defendants and Respondents.**	**A136322, A137418** **(San Francisco County Super. Ct. No. CGC-10-505052)**

Jazmin Barrera, Marta Flores, and Mauricio Ramirez appeal from a judgment entered in an action they brought against respondents Harry E. Jensen III, Tod Schlesinger, and A-1 Property Management and Investment.[1] Plaintiffs rented apartments in a building owned and managed by defendants, and after plaintiffs' apartments were burglarized, they sued defendants seeking damages and injunctive relief. Defendants filed a cross-complaint for damages and a declaration of the parties' rights under plaintiffs' rental agreements.

A jury found in favor of plaintiffs on a claim for negligent maintenance of property, but it returned defense verdicts on plaintiffs' remaining causes of action. The trial court awarded defendants declaratory relief. Plaintiffs then filed a motion for new trial. Both plaintiffs and defendants filed motions asking the court to designate them

[1] For convenience, we will refer to appellants Barrera, Flores, and Ramirez collectively as "plaintiffs" save when context requires that they be identified individually. Similarly, we will refer to respondents Jensen, Schlesinger, and A-1 Property Management and Investment collectively as "defendants" except when the context otherwise requires.

prevailing parties and seeking attorney fees and costs. The trial court denied plaintiffs' motion for new trial. It also denied both requests for attorney fees and ordered the parties to bear their own costs.

Plaintiffs appealed from the judgment and from the court's postjudgment order denying their motions for new trial and for attorney fees. Defendants cross-appealed, challenging the order denying them attorney fees. We have examined the record and the parties' contentions, and we find no reason to disturb the jury's verdicts or the trial court's orders denying attorney fees and costs. Accordingly, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

These appeals have a voluminous record, but the issues on appeal do not require an extended exposition of the underlying facts. We recite the facts in the manner most favorable to the judgments (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 552-553.), although we will note conflicts in the evidence bearing on the arguments on appeal. Additional facts relevant to the parties' arguments are contained in the discussion section of this opinion.

The May 25, 2010 Burglaries

Plaintiffs each rented apartments from defendants in a building located at 3334 San Bruno Avenue in San Francisco. On May 25, 2010, plaintiffs' units were burglarized. The burglars stole plaintiffs' personal property.

The apartment building where plaintiffs lived has a garage at street level with two doors opening onto the sidewalk. One of the garage doors is automatic. Plaintiffs and another of the building's tenants testified that before the burglaries occurred, the automatic garage door had been malfunctioning and was sometimes stuck in the open position. Schlesinger, the building's co-owner and manager, testified that the garage door had been operating properly the week prior to the burglaries and there was no problem with it when it was checked the day after the crimes occurred.

Plaintiffs' security and crime prevention expert testified at trial regarding the different ways in which someone might have gained access to the building. He explained that unauthorized persons could enter the building when the garage door was open for

trash removal or when it opened to allow tenants to enter and exit in their cars. Meter readers and letter carriers also had keys to enter the building and might leave doors open. Other possible access routes were over a rear fence, from the roofs of surrounding buildings, or from low-hanging fire escapes. The expert also mentioned the possibility that tenants might have given out keys to people who did not live in the building. He expressed no opinion as to how the burglars had actually entered the building, however, because "[e]vidence gathering wasn't part of [his] assignment." His only task was to list the possible means of entry.

Plaintiffs' Request for Compensation and Subsequent Relations With Schlesinger

Only July 22, 2010, plaintiffs' counsel wrote a letter to Schlesinger asserting that the building's owner was responsible for the property losses due to the burglaries and asking for compensation. The letter outlined plaintiffs' legal theories and asked that Schlesinger notify the owner's insurance carriers.

Plaintiffs testified that after this letter was sent, Schlesinger reacted by threatening and harassing them. On or about July 31, 2010, the rear windows of Flores's and Ramirez's cars were smashed while they were parked in the building's garage. Nothing was stolen from the cars, and none of the other vehicles parked in the garage were damaged. Schlesinger denied threatening plaintiffs, and he also denied breaking the windows of their cars. In response to a question from plaintiffs' counsel, Schlesinger testified it was his policy not to threaten tenants.

Plaintiffs' Action

Plaintiffs originally brought this action against defendants in November 2010. Their operative second amended complaint alleged 10 causes of action.[2] Broadly

[2] The complaint alleged causes of action for breach of the implied warranty of habitability, intentional infliction of emotional distress, violation of statutory duties, breach of the implied covenant of quiet use and enjoyment, breach of contract, violation of the San Francisco Residential Rent Stabilization and Arbitration Ordinance, retaliatory eviction, injunction, negligent maintenance of property, and constructive eviction.

Plaintiffs' opening brief informs us they dismissed most of these claims before the case was submitted to the jury. Thus, the jury considered only their claims for implied

speaking, plaintiffs sought recovery for two distinct series of events. The first events were the May 2010 burglaries, which resulted in plaintiffs' loss of personal property. Plaintiffs alleged the burglaries were the result of defendants' negligent failure to maintain the garage door in proper condition. They further claimed defendants' failure to maintain the property breached the implied warranty of habitability.

The second series of events concerned defendants' alleged actions after the burglaries. Plaintiffs asserted that defendants refused to compensate them for their losses and instead mounted an attack on them. According to plaintiffs, defendants sought to force them to abandon their claims for losses by using threats, fear, and harassment. The second series of events allegedly gave rise to causes of action for wrongful eviction, tenant harassment, and breach of the covenant of quiet use and enjoyment. Plaintiffs claimed Schlesinger made verbal threats to them, and their complaint implied he may have been responsible for smashing in the windows of their cars.

Defendants filed a cross-complaint against Barrera and Ramirez for breach of contract and seeking declaratory relief as to whether they had breached their rental agreements. Specifically, defendants alleged Barrera's rental agreement gave her use of a parking space in the building's garage, but that Barrera had been arbitrarily deducting $15 per month from her rent since she ceased to use the space. Defendants alleged Ramirez's rental agreement did not include a parking space but Ramirez had been parking in the garage without paying for the space. Defendants sought a declaration that Barrera was obligated to pay for her parking space whether or not she used it and that Ramirez had no right to garage parking and was obligated either to vacate the space or pay defendants its market value.

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warranty of habitability, breach of the implied covenant of quiet use and enjoyment, tenant harassment in violation of the San Francisco Residential Rent Stabilization and Arbitration Ordinance, and "wrongful eviction" as to plaintiff Flores only. Although the dismissals are not part of the record before us, the parties agree on this point, and we therefore accept their representations as fact. (See *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1097-1098 [court may rely on statements in brief as admissions].) We will discuss only those claims that were actually submitted to the jury.

Trial, Verdicts, and Postjudgment Motions

A jury trial began May 9, 2012, and concluded on May 16. The jury was given a set of special verdict forms covering plaintiffs' causes of action for breach of the implied warranty of habitability, breach of the covenant of quiet enjoyment, negligent maintenance of the property, tenant harassment, and as to Flores, wrongful eviction. The jury returned verdicts on May 18, finding defendants had not breached either the implied warranty of habitability or the covenant of quiet use and enjoyment. It also found in defendants' favor on plaintiffs' claims of tenant harassment and on Flores's claim for wrongful eviction. The jury found defendants had been negligent in maintaining the property, however, and it awarded damages of $13,550 to Barrera, $4,900 to Flores, and $3,700 to Ramirez, for a total of $22,150. On defendants' cross-complaint, it found Barrera had breached her contract with defendants and awarded $217.50 in damages. It also found Ramirez had breached his contract but awarded no damages.

On June 6, 2012, the trial court took up plaintiffs' request for an injunction and defendants' requests for declaratory relief. It denied plaintiffs' request for an injunction but granted defendants declaratory relief in the dispute over Barrera's and Ramirez's parking spaces.

The court entered judgment on the jury verdicts on June 15, 2012. On the same day, it entered judgment on the cross-complaint.

Plaintiffs subsequently moved for a new trial on their contract causes of action, arguing that the jury's verdicts on their claims for breach of the implied warranty of habitability and breach of the covenant of quiet use and enjoyment were inconsistent with the verdicts on their claims for negligent maintenance of property. They also contended the trial court had erred in making certain evidentiary rulings. After a hearing, the court denied the motion.

Both parties filed motions seeking to be designated the prevailing party and requesting attorney fees and costs. The trial court heard plaintiffs' motion for attorney fees first, and it denied their request for prevailing party status and ordered each side to bear its own fees and costs. The court considered defendants' request for an award of

attorney fees at a later hearing, and consistent with its earlier ruling, it denied the request and again ordered the parties to bear their own fees and costs.

Plaintiffs filed notices of appeal from the judgment and the order denying their motion for attorney fees and costs. Defendants appealed from the order denying their motion for attorney fees.

DISCUSSION

In their appeal, plaintiffs argue the special verdicts are fatally inconsistent. They also challenge a number of trial court's rulings regarding the admissibility of evidence. Finally, they contend the trial court erred in denying them costs and attorney fees. Defendants' cross-appeal challenges only the trial court's denial of their request for an attorney fee award. We first address the arguments presented by plaintiffs' appeal. Because the parties' challenges to the denial of their requests for attorney fees are factually and legally intertwined, we consider them together.

I. *The Special Verdicts Are Not Fatally Inconsistent.*

Plaintiffs' principal argument is that the jury's finding in their favor on their negligent maintenance claim cannot be reconciled with its findings for the defendants on the claims for breach of the implied warranty of habitability and covenant of quiet use and enjoyment. They argue the inconsistency in the verdicts requires reversal and remand for a new trial. We summarize the facts relevant to this issue before analyzing the parties' arguments.

A. *Factual Background*

After the jury indicated it had reached a verdict, the trial court read the verdict forms and remarked, "I am not sure that there is a problem here. I'm not. So I'm going to ask the bailiff to give these verdict forms back to the foreperson." The jury returned to the jury room, and the trial court and counsel discussed the court's concern that the verdict forms did not include separate tort and contract forms for plaintiffs' causes of action for the alleged breaches of the implied warranty of habitability and the covenant of quiet enjoyment. Both parties' counsel explained, however, that they had "merged" the verdict forms. The trial court then asked counsel to clarify whether they had intended to

use a single verdict form for each of those causes of action, even though each cause of action was based in both contract and tort. Both plaintiffs' and defendants' counsel agreed this had been their intent. The trial judge then said the problem was her "misunderstanding about using the merged verdict form."

The court continued to discuss the matter with counsel, voicing concern that the verdict forms as written did not contain separate findings for the warranty of habitability and quiet enjoyment tort claims. The trial court observed that in addition to pleading those claims as breaches of contract, plaintiffs had also pleaded them as torts, using a negligence theory. The problem, in the court's view, was that the verdict forms did not provide for any negligence findings on those causes of action. The court and counsel then discussed how to remedy the problem, after which the court recessed.

When the proceedings resumed, the trial court stated it had had a conversation with all counsel and it was "counsels' understanding . . . that the verdict forms that were sent in cover all causes of action[.] . . . So notwithstanding the verdict forms . . . do not contain . . . the normal tort language as in [CACI] VF-400, the intent of the forms was to . . . cover any claims of negligence by the defendants with regard to Implied Warranty of Habitability and Covenant of Quiet Enjoyment." Both plaintiffs' and defendants' counsel expressed their agreement on the record.

The jury was then recalled, and the verdicts were read out in open court. The court asked whether counsel wished to have the jury polled, and plaintiffs' counsel said yes, but limited his request to the verdict on tenant harassment. The trial court asked whether plaintiffs were waiving their right to have the jury polled on the other causes of action, and plaintiffs' counsel responded that he wanted only the implied warranty of habitability and tenant harassment claims polled. The clerk polled the jury on the implied warranty of habitability cause of action, and then began to poll the jury on the tenant harassment cause of action. Before polling was complete, plaintiffs' counsel told the court "that's sufficient." Counsel waived the remaining polling he had requested. The court then discharged the jury. Plaintiffs' counsel did not object to the verdict and requested no clarification.

B. *Plaintiffs Forfeited Their Objection to the Special Verdicts.*

Plaintiffs contend they are entitled to a new trial because the verdicts are inconsistent and ambiguous. Specifically, they argue the jury made irreconcilably inconsistent findings as to whether the garage door was in repair on the day of the burglaries. Plaintiffs note the jury found defendants were negligent in maintaining the property and further found this negligence was a substantial factor in causing harm to plaintiffs. In what plaintiffs claim is a contradiction, the jury also found plaintiffs and defendants had entered into a contract, but defendants had not failed to do anything the contract required. Plaintiffs argue that by finding in their favor on the negligent maintenance cause of action, the jury necessarily found defendants had been negligent regarding the garage door. At the same time, the jury allegedly inconsistently concluded defendants had not failed to do anything required by the contract, which means the jury must have found defendants had not failed to repair the garage door. The premise of plaintiffs' argument is that defendants' failure to maintain the garage door was the only act of negligence or breach of contract at issue.

Defendants' initial argument is that plaintiffs have forfeited this issue by failing to object to the apparent inconsistency in the verdicts before the jury was discharged. Conceding they did not object below, plaintiffs reply that the issue is not forfeited because their failure to object was not an effort to gain a tactical advantage. In addition, they claim they did not object because the trial judge had made clear any such objection would be futile. We conclude plaintiffs have forfeited the issue.

1. *Governing Law*

" 'A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. [Citation.]' [Citation.] 'On appeal, we review a special verdict de novo to determine whether its findings are inconsistent. [Citation.] . . . " ' "Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error." ' [Citations.]" [Citation.] . . . The proper remedy for an inconsistent special verdict is a

new trial. [Citation.]' [Citation.]" (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 585.)

"Potentially defective special verdicts are subject to 'a multilayered approach.' (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1091 (*Zagami*).) Prior to the jury's discharge, the trial court is obliged upon request to ask the jury to correct or clarify a potentially ambiguous or inconsistent verdict. (*Ibid.*) If the verdict is 'merely ambiguous,' a party's failure to seek clarification of the verdict before the jury is discharged may work a forfeiture of the purported defect on appeal, 'particularly if the party's failure to object was to reap a ' " 'technical advantage' " ' or to engage in a " ' "litigious strategy." ' " ' (*Id.* at p. 1092, fn. 5, quoting *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457.) However, absent a forfeiture, courts may properly interpret a 'merely ambiguous' verdict in light of the pleadings, evidence, and instructions. (*Id.* at p. 1092, fn. 5.) In contrast, if the special verdicts are ' " 'hopelessly ambiguous' " ' or inconsistent, failure to seek clarification from the jury does not create a forfeiture, and the proper remedy is ordinarily a retrial on the issues underlying the defective verdict. (*Id.* at p. 1092.)" (*Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 299-300 (*Little*).)

2. *The Special Verdicts Are Merely Ambiguous.*

Plaintiffs argue their only claim of negligent conduct was defendants' failure to maintain the garage door, and the jury's finding of liability on plaintiffs' negligence claim indicates the jury found defendants had failed to keep the garage door in operable condition. In contrast, plaintiffs assert, the jury found defendants had not failed to do anything their contracts with plaintiffs required them to do, or "in other words, did not fail to repair the garage door." Plaintiffs view these findings as fatally inconsistent.

We disagree. The jury found defendants negligent, but the special verdict forms—to which plaintiffs' counsel agreed—did not specify exactly *how* defendants had been negligent. " 'Where, as here, there is no special finding on what negligence is found by the jury, the jury's finding is tantamount to a general verdict.' " (*Davis v. Hernandez, supra,* 226 Cal.App.4th at p. 586.) Since the jury was not asked to state specifically what

acts of the defendants were negligent, we cannot determine whether it accepted plaintiffs' theory that defendants' alleged failure to properly maintain the garage door was the cause of plaintiffs' injuries or whether it found defendants negligent in some other respect.[3] For example, the jurors might have credited the testimony of plaintiff's security and crime prevention expert that someone could have entered the building either through the front door or the garage door when those doors were opened for other purposes, such as tenant ingress and egress, trash removal, meter reading, or mail delivery. The jury could then have accepted the testimony of plaintiffs' property management expert and found defendants had breached the standard of care by failing to communicate to the tenants the necessity of ensuring that all doors be kept closed and locked.[4] (See *id*. at pp. 586-587 [explaining that jury could have accepted any number of different factual theories in reaching negligence verdict]; *Fry v. Pro-Line Boats, Inc.* (2008) 163 Cal.App.4th 970, 974 [where verdict form did not require jury to specify particular ways in which boat failed to perform, jury might have found that some defects claimed by plaintiff existed but not others].)

In addition, in their opening brief, Plaintiffs hypothesize that the findings on the claims for breach of the implied warranty of habitability and the covenant of quiet use and enjoyment might be interpreted to mean the jury mistakenly believed repairing the garage door was not required by the contracts. They note the rental agreements have no explicit language requiring the landlords to make this repair, and then go on to explain

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[3] Plaintiffs point out that they proposed a special verdict form asking specifically whether Schlesinger left the garage door open. For reasons not apparent to us, plaintiffs failed to make a record on why this proposed form was not used. That aside, as explained above, plaintiffs' counsel affirmatively agreed to the use of the verdict forms submitted to the jury. Furthermore, on appeal, plaintiffs do not argue that the special verdict forms were themselves defective; they argue only that the verdicts are inconsistent. Plaintiffs have therefore abandoned any argument concerning defects in the verdict forms. (See *Kelly v. CB & I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 451 [failure to raise omission in special verdict form in opening brief forfeits issue on appeal].)

[4] Indeed, in closing argument, plaintiffs' counsel alluded to the possibility that "people [were] leaving the garage door open" and remarked that defendants had been told the door was open but had not advised tenants to be vigilant about security.

how the trial court's revisions to the jury instructions on a landlord's duty to install locking doors "could explain a jury belief that repairing the garage door was not required by the contract." Plaintiffs thus appear to agree that there are other possible explanations for the jury's verdicts. And while plaintiffs assert that the trial court's revised instructions did not fairly state the law, their argument on this point is only two paragraphs long and is not contained under a separate heading. They have therefore forfeited any argument about the correctness of this jury instruction. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294 (*Provost*) ["Although we address the issues raised in the headings, we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument."]; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*) ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."].)

"Where special verdicts appear inconsistent, if any conclusions could be drawn which would explain the apparent conflict, the jury will be deemed to have drawn them." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.) Here, since there are other conclusions the jury might have drawn from the evidence, its general finding of negligence is not necessarily equivalent to a specific finding that defendants were negligent in failing to keep the garage door in operable condition. Because the special verdicts are not irreconcilably inconsistent, plaintiffs have forfeited any challenge to the verdicts by failing to seek clarification from the jury before it was discharged.[5] (*Little, supra,* 202 Cal.App.4th at p. 300.)

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[5] Plaintiffs argue strenuously that the argument has not been forfeited because their failure to object was not part of an effort to reap a technical advantage or to engage in a litigious strategy. They rely on language in *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456, footnote 2 (*Woodcock*). The California Supreme Court has since clarified that the exception to the forfeiture rule articulated in this footnote of the *Woodcock* opinion is mere dictum. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 269.) It has also expressed its unwillingness to extend the exception. (*Id*. at p. 270.) Moreover, the *Woodcock* exception appears to apply only in cases in which the defect in

Finally, and perhaps most importantly, plaintiffs' counsel appears to have helped draft the verdict forms ultimately submitted to the jury, a factor weighing heavily in favor of forfeiture.[6] "Absent unusual circumstances . . . , appellate courts generally are unwilling to second guess the tactical choices made by counsel during trial." (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.) Where an inconsistent verdict results from special verdict forms drafted jointly by the parties, the doctrines of invited error and forfeiture will combine to preclude a party from challenging the verdict on grounds of an inconsistency its counsel's actions helped create. (See *id.* at pp. 1686-1687 [where party drafted allegedly defective special verdict form, it forfeited objection to inconsistency in verdict].)

3. *The Trial Court Was Not Responsible for the Ambiguous Verdicts.*

Plaintiffs seek to lay blame for their failure to object at the trial court's feet. They first claim the trial court's remark about a possible problem with the verdicts referred to the alleged inconsistency we discussed in the preceding section. Plaintiffs' claim flies in the face of the record. Contrary to plaintiffs' representation of the record, the reporter's transcript demonstrates clearly that the trial court intervened to express its concern that counsel had drafted verdict forms which combined plaintiffs' tort and contract theories on the breach of implied warranty of habitability and quiet enjoyment claims. The court did *not* allude to any supposed inconsistency between the jury's findings on those claims and the negligent maintenance claim. In our view, what the trial judge did here was no more than recognize a potential problem, decline to take the verdict, and send the jury back to the jury room to allow time for a discussion with counsel about what the judge viewed as a possible ambiguity. The trial judge's caution was entirely appropriate.

In their reply brief, plaintiffs effectively accuse the trial judge of bias, claiming she "made no secret that she was unhappy and repeatedly cited Plaintiffs for alleged

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the verdict is latent and not where, as in this case, the defect is both apparent and of counsel's own making. (See *id*. at p. 270, fn. 31.)

[6] At oral argument, in response to questions from the court, plaintiffs' counsel expressly conceded he had participated in drafting the special verdict forms.

violations of her in limine motions [*sic*]." They claim it would have been futile to make any inquiry regarding the verdicts "as the outcome read by the Jury seemed to be the outcome that [the trial court] wanted received, otherwise [the court] would not have stopped our progress in creating additional [verdict] forms, instead requesting we stipulate in order to take the verdict."

Plaintiffs' efforts to impugn the trial judge are as meritless as they are inappropriate. First, "a trial court's numerous rulings against a party – even when erroneous – do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) Second, nothing in the record suggests the trial court stopped plaintiffs from creating new verdict forms. Instead, the parties' counsel agreed that the verdict forms they had previously devised were acceptable, an agreement they later reiterated in open court after an off-the-record discussion with the trial judge. Had plaintiffs wished to object to the forms, they could have done so. Finally, we remind counsel that "[d]isparaging the trial judge is a tactic that is not taken lightly by a reviewing court." (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.) Accusations that the trial judge is biased or has prejudged the case are quite inappropriate unless supported by compelling evidence. The record before us contains no such evidence.

II. *The Trial Court Did Not Abuse its Discretion in Excluding Evidence of Schlesinger's Prior Conduct.*

Prior to trial, defendants filed a motion in limine asking the court to exclude evidence of Schlesinger's prior unrelated conduct. Plaintiffs opposed the motion and contended they should be permitted to introduce evidence of Schlesinger's conduct and statements involving tenants at different rental properties. The gist of plaintiffs' argument was that Schlesinger's statements were relevant to their claim of retaliation, because the statements showed Schlesinger threatened tenants who asserted their rights. Plaintiffs contended the evidence was admissible to prove Schlesinger's state of mind. (Evid. Code, § 1250, subd. (a) [evidence of statement of declarant's state of mind admissible either to prove state of mind or to explain declarant's acts or conduct].) They

also argued it was admissible despite the general prohibition against character evidence, either because it showed Schlesinger's intent or went to the issue of his credibility. (Evid. Code, § 1101, subd. (b) [evidence of other acts admissible to prove fact such as intent]; Evid. Code, § 1101, subd. (c) [evidence of other acts admissible to support or attack credibility of witness].)

After a hearing, the trial court excluded most of the evidence subject to the motion in limine. The court noted that the evidence plaintiffs sought to admit involved "a host of witnesses[.]" It then explained that admission of evidence of Schlesinger's interactions with other tenants would require a "mini trial" and thus result in undue consumption of time. The court was also concerned that admission of the evidence would be prejudicial to Schlesinger and confusing to the jury. Weighing the probative value of the proffered evidence against its prejudicial effect, the court determined it should be excluded under Evidence Code section 352.

Evidence Code section 352 expressly grants trial courts discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "[I]t is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. [Citation.] And the trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. [Citation.]" (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762 (*Gouskos*).)

In this court, plaintiffs argue the trial court should have admitted the evidence at issue. What their briefs fail to do, however, is present any challenge to the trial court's reasons for excluding it. Plaintiffs provide a lengthy explanation of why they believe the evidence is admissible under Evidence Code section 1101, but they do not address the matters that formed the basis of the trial court's ruling—undue consumption of time, prejudice to Schlesinger, and confusion of the jury. In other words, they make no claim that the evidence would *not* have been time-consuming, prejudicial, or confusing. An

appealing party forfeits any contention that a trial court erred in excluding evidence under section 352 where, as here, the party does not address the trial court's actual reasons for excluding it. (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 171 [where trial court excluded evidence under Evid. Code, § 352 because it would confuse jury, appellant forfeited argument that evidence was improperly excluded by failing to address trial court's reason for refusing to admit it].)

Even if the claim were not forfeited, it would be meritless. We cannot say the trial court abused its discretion in concluding the probative value of this evidence was outweighed by the risk it would consume too much time. In addition to presenting documentary evidence, plaintiffs intended to call at least four witnesses to testify to Schlesinger's interactions with other tenants. Defense counsel alerted the court to his intention to call his own witnesses to rebut the testimony if the court decided to allow it. The court could thus reasonably conclude that admission of the evidence would result in a mini trial as to each incident. The trial court also determined the evidence would inflame the jury against Schlesinger, and thus the prejudice to him outweighed the probative value of the evidence. This determination was the province of the trial court, and we cannot say it was an abuse of the court's discretion. (*Gouskos, supra*, 94 Cal.App.4th at p. 762.) We therefore conclude the trial court did not err.[7]

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[7] Under the same heading in their opening brief, plaintiffs argue that Schlesinger was allowed to offer an innocent explanation of what the tenants considered threats. Although it is far from clear, we take this to be an argument that Schlesinger's answers to certain questions opened the door to the evidence plaintiffs sought to admit. Because the argument is not made under a separate heading and is not adequately developed, we will not consider it. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Provost, supra*, 201 Cal.App.4th at p. 1294.)

In any event, we note that Schlesinger's answers were in response to questions from *plaintiffs'* counsel. Counsel asked Schlesinger whether he had caused the windows of Ramirez's and Flores's cars to be smashed in. Schlesinger denied any responsibility and called the question "ridiculous" and "[p]reposterous." Counsel then asked whether it was Schlesinger's "policy not to threaten tenants" and Schlesinger responded that if he "was going around threatening tenants . . . , [he would] have been out of business a long time ago." Counsel asked whether this had been Schlesinger's policy for the last 20

III. *The Trial Court Did Not Abuse its Discretion in Excluding the Letter From Plaintiffs' Counsel.*

Plaintiffs also contend the trial court erred in refusing to admit into evidence the July 22, 2010 letter their counsel wrote to Schlesinger. Plaintiffs moved in limine to admit the letter, but after hearing argument from counsel, the trial court denied the motion. Although the court refused to admit the letter itself, it ruled that witness testimony could supply the fact that plaintiffs had caused a letter to be sent to Schlesinger expressing their view that he was responsible for their losses and seeking compensation for them.

At trial, Schlesinger was asked whether he was upset or angry after receiving the July 22, 2010 letter. He responded, "No, not particularly. [¶] I – I get threatening letters from attorneys from time to time. It goes with the territory." Plaintiffs' counsel then asked Schlesinger whether he considered the letter threatening, and Schlesinger said yes. The following week, plaintiffs' counsel asked the court to revisit its in limine ruling regarding the letter. After hearing from counsel, the trial court elected to stand by its in limine ruling.

Plaintiffs contend Schlesinger's testimony allowed him to bolster his claim that he only threatened tenants after he had been threatened, and thus the letter was needed to rebut Schlesinger's characterization of it as threatening.[8] They argue that prejudice is obvious because they lost on their claims of tenant harassment. We disagree.

The trial court's rulings on the admissibility of evidence, "whether in limine or during trial, are generally reviewed for abuse of discretion." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 (*Pannu*).) The lower court's error in excluding evidence merits reversal " 'only if the party appealing demonstrates a

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years, and Schlesinger answered, "More." After a side bar conference, the court ruled that counsel's questions had violated her ruling on defendants' motion in limine.

[8] Plaintiffs note that during its deliberations, the jury asked whether the letter had been omitted from the evidence. With the agreement of counsel, the court responded to the jury that the letter "was not admitted into evidence by the Court. There is testimony about it."

"miscarriage of justice"—that is, that a different result would have been probable if the error had not occurred.' " (*Ibid.*, quoting *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480 (*Zhou*).) Here, plaintiffs fail to explain, much less demonstrate, how it is reasonably probable admission of the letter would have resulted in a more favorable outcome. Without such a demonstration, we cannot disturb the judgment below.[9] (Evid. Code, § 354; *Pannu*, *supra*, at p. 1317; see *Zhou*, *supra*, at pp. 1480-1481 [trial court's erroneous exclusion of letters was harmless where party failed to show exclusion caused miscarriage of justice].)

IV. *Plaintiffs Have Not Shown the Trial Court Failed to Consider the Relevant Factors in Denying Their Request for Costs.*

Plaintiffs argue the trial court abused its discretion by failing to apply the proper standard when it declined to award them costs. They contend this alleged failure requires us to remand the matter for further consideration. We disagree.

A trial court's denial of costs under Code of Civil Procedure section 1033, subdivision (a) is reviewed for abuse of discretion. (*Guerrero v. Rodan Termite Control, Inc.* (2008) 163 Cal.App.4th 1435, 1445, fn. 6.) The court is not required to issue a statement of reasons for its decision. (*Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1105.) Importantly, in the absence of a record showing the contrary, we *presume* the court considered all the relevant factors. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1250.) Here, nothing in the record suggests the trial court did not consider them. Plaintiffs' memorandum in opposition to defendants' motion to tax costs discussed what plaintiffs contend are the relevant factors. And at the hearing on the

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[9] We add that the trial court was required to weigh a number of factors in making its ruling. It had to consider defense counsel's argument that admission of the letter should entitle the defense to comment on the conduct of plaintiffs' counsel. The defense also contended the jury would be unable to judge the totality of the letter since the court had determined that legal argument and references to insurance in the letter would have to be redacted. (See *Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 143 [trial court had discretion to exclude declaration where attached transcript was so heavily redacted].) This sort of balancing is within the province of the trial court, and absent more compelling argument, we are disinclined to second guess it.

motion, the trial court indicated it had read both defendants' motion to tax costs and plaintiffs' opposition. Thus, far from supporting plaintiffs' contention that the court failed to consider the appropriate factors, the record actually supports the opposite inference. We discern no error.

V. *The Trial Court Had Discretion to Deny the Parties' Requests for Attorney Fees.*

The trial court denied both parties' requests for attorney fees, and both parties contend the court erred. We set forth in some detail the trial court's rulings on those requests before turning to the parties' arguments.

A. *The Trial Court's Rulings Denying Attorney Fees*

In its oral ruling on plaintiffs' motion for attorney fees, the court discussed at length the relative success of the parties in achieving their litigation objectives. The trial court noted plaintiffs had prevailed only on their negligence claim "as against a clean sweep of verdicts as to [plaintiffs] as to all remaining counts." The court opined that while plaintiffs had been awarded some money, "the gravamen of this litigation was a greater scope." It explained plaintiffs had not prevailed on what it called their "big ticket items," and it considered the outcome of the case a "mixed verdict[.]" The court initially expressed the view that the attorney fee provision of the rental agreements did not cover plaintiffs' entitlement to fees "because of the minimal and somewhat negligible amounts returned to the Plaintiffs on [the negligence] count." The court stated, however, that in the event it was wrong and the provision did apply, its comments indicated that the proper ruling was to require the parties to bear their own fees and costs.

The trial court took a similar approach when it later ruled on defendants' motion for attorney fees. Addressing the prevailing party issue in its comments from the bench, the court again reviewed the extent to which the parties had achieved their respective goals in the litigation. Looking beyond the money judgments and analyzing the parties' theories of the case, it determined that each side should bear its own costs and fees. The court explained its ruling was based on its consideration of "the lawsuit as a whole."

B. *Code of Civil Procedure Section 1034, Subdivision (a)(4) Gave the Trial Court Discretion to Determine Which Party Prevailed.*

The parties' requests were based on paragraph 26 of the rental agreements, which provides: "**Attorney Fees**: In any action or proceeding involving a dispute between Landlord and Tenant arising out of this Agreement, the prevailing party will be entitled to reasonable attorney fees and any costs incurred." Both parties contend, and we agree, that the language of this provision is broad enough to encompass both contract and tort claims.[10] (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 603, 608 (*Santisas*) [attorney fee provision embracing claims " 'arising out of the execution of th[e] agreement' " is broad enough to support fee award to prevailing party in action alleging both contract and tort claims].) The parties disagree, however, on who should be considered the prevailing party for purposes of the attorney fee award.

1. *Plaintiffs' Success on the Negligent Maintenance Claim Does Not Make them Prevailing Parties.*

Plaintiffs argue they are the prevailing parties because they succeeded on the principal issue in the litigation. In their view, "[b]ecause the main issue that was actually litigated was the burglaries, [they] should have been deemed prevailing parties and awarded their attorney's fees." They quote from *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140 (*Graciano*), in which the court stated, " ' "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit." ' " (*Id*. at p. 153.) But *Graciano* was a case in which the plaintiff sought fees under two separate fee shifting statutes. (*Id*. at pp. 149-151.) It provides no

[10] Thus, the trial court erroneously concluded that the attorney fee provision did not apply because plaintiffs prevailed only on their negligence claim. For our purposes, however, this makes no difference, since a trial court's attorney fees order may be affirmed if it is correct on any theory. (*RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 776 [trial court's attorney fee order will be affirmed if correct on any theory even if reasoning is erroneous].) Moreover, the trial court offered an alternate rationale for its ruling assuming that the attorney fee provision did apply. It based its decision upon its assessment of the parties' relative success in the litigation. As we will explain, this was a proper exercise of the court's discretion.

guidance in this case, because the technical definitions of prevailing party under those statutes do not apply where, as here, attorney fees are sought on the basis of contract. (See *In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1603 [distinguishing *Graciano* on this basis].) Thus, plaintiffs have failed to demonstrate any legal entitlement to prevailing party status.

2. *Plaintiffs Have Forfeited the "Net Monetary Recovery" Argument.*

In their reply brief, plaintiffs expand greatly on their attorney fees argument and contend they are entitled to an award because they were the party with the net monetary recovery. (Code Civ. Proc., § 1032, subd. (a)(4) [" 'Prevailing party' includes the party with a net monetary recovery"]; *Maynard v. BTI Group, Inc.* (2013) 216 Cal.App.4th 984, 992 (*Maynard*) [where attorney fee provision encompasses noncontractual claims, party entitled to fees will generally be party whose net recovery is greater].) Plaintiffs did not make this argument either below or in their opening brief, and it is therefore doubly forfeited. (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 776.) Arguments first made in an appellant's reply brief come too late. (*Benach, supra,* 149 Cal.App.4th at p. 852, fn. 10 ["Benach devotes more attention to this point in his reply brief. It is too late. An appellant's duty attaches at the outset. It would be unfair to permit an appellant to wait to argue his substantive points until after the respondent exhausts its only opportunity to address an issue on appeal."].)

3. *Defendants' Recovery of Declaratory Relief Left the Prevailing Party Determination to the Trial Court's Discretion.*

Even if plaintiffs' argument were properly before us, it would be meritless. To explain why, we must outline the statutes that govern attorney fee awards in cases in which an attorney fee provision encompasses both contractual and noncontractual claims.

A prevailing party is generally entitled to recover its costs in any action or proceeding. (Code Civ. Proc., § 1032, subd. (b).) Recoverable costs ordinarily do not include attorney fees, however, unless such fees are specifically authorized by statute or agreement. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127; see also Code Civ. Proc., § 1021.) Recoverable litigation costs will therefore include attorney fees

"only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees." (*Santisas, supra,* 17 Cal.4th at p. 606, citing Code Civ. Proc., § 1033.5, subd. (a)(10).)

Under Code of Civil Procedure section 1021, parties have the right to enter into agreements for the award of attorney fees in litigation. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 (*Xuereb*).) For actions sounding in contract, Civil Code section 1717, subdivision (a) provides the rule for determining which party is the prevailing party: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

But by its terms, Civil Code section 1717 applies only to contract claims. (Civ. Code, § 1717, subd. (a).) "[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." (*Xuereb, supra,* 3 Cal.App.4th at p. 1341.) "An agreement to pay attorney fees to the prevailing party in an action not governed by Civil Code section 1717 or some other statute is controlled by the more general provisions found in the Code of Civil Procedure. [Citations.] As indicated above, [CCP] section 1021 authorizes parties to enter an attorney fee agreement. [Citation.] [CCP] Section 1032, subdivision (b) provides that '[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding' and [CCP] section 1033.5, subdivision (a)(10)(A) provides that allowable costs include attorney fees 'when authorized by . . . Contract.' [CCP] Section 1032, subdivision (a)(4) defines a prevailing party for the purpose of determining the right to recover allowable costs under these provisions as including the party 'with a net monetary recovery.' " (*Maynard, supra,* 216 Cal.App.4th at pp. 993-994.)

While plaintiffs belated argument is based on the language of Code of Civil Procedure section 1032, subdivision (a)(4), it ignores a key portion of that provision. That section also provides that "[w]hen *any party recovers other than monetary relief* . . . , the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not[.]" (Code Civ. Proc., § 1032, subd. (a)(4), italics added.) Here, defendants' cross-complaint sought a declaration that: (1) Barrera was obligated to pay them her contractual rental obligation regardless of whether she used her parking space or not and (2) Ramirez had no contractual right of access to the parking garage. The trial court granted the declaratory relief defendants sought. Thus, because defendants obtained declaratory relief, "the prevailing party determination [was] properly a matter for the trial court's discretion." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1142 [where defendant prevailed on cross-complaint for declaratory relief, trial court could exercise discretion to determine prevailing party even though plaintiff obtained net monetary recovery]; *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 104-105 [trial court had discretion to determine prevailing party where plaintiffs recovered money judgment but defendants won declaratory relief].)

"The dispositive inquiry for us as a reviewing court is whether the trial court abused its discretion[.]" (*Lincoln v. Schurgin*, *supra*, 39 Cal.App.4th at p. 105.) In this case, we find no such abuse. The trial court denied plaintiffs request for attorney fees after noting that plaintiffs had prevailed on only one claim in their complaint, had withdrawn several others before the case was submitted to the jury, and had lost on all counts of defendants' cross-complaint. The court also referred to the relatively small amount of money plaintiffs had been awarded in damages. Thus, the court balanced the fact that plaintiffs had recovered a net money judgment against defendants' success on the contractual and declaratory relief claims. "Given these circumstances, we cannot say

the trial court abused its discretion in ordering the parties to bear their own [fees and] costs."[11] (*Id*. at p. 106.)

4. *The Trial Court Also Had Discretion to Find Defendants Were Not the Prevailing Parties.*

The foregoing discussion also disposes of defendants' challenge to the denial of their request for attorney fees. As we have explained above, defendants' recovery of declaratory relief gave the trial court discretion to determine the prevailing party, and the statute permitted the court to award no costs. (Code Civ. Proc., § 1032, subd. (a)(4).) We have concluded that discretion was not abused.

Defendants propose a different analysis of the issue, but even if we were to accept their approach, it would not yield a different result. In this court, defendants argue they are entitled to attorney fees because they are the prevailing parties based on a "pragmatic definition of the extent to which each party has realized its litigation objectives." (*Santisas*, *supra*, 17 Cal.4th at p. 621.) As defendants concede, however, the attorney fee provision of the rental agreements does not define the term "prevailing party." Where the contract provides no definition, the trial court must use its discretion to decide which party has prevailed. (See *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 193.) In exercising that discretion, the trial court may consider the extent to which the parties have achieved their respective litigation objectives. (See *ibid*.) Here, the trial court concluded that neither party fully achieved its objectives and thus no party should

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[11] The trial court also alluded to the fact that plaintiffs' recovery was below the amount that could have been recovered in a limited civil case. Where a plaintiff obtains a judgment for money damages in an amount that could have been recovered in a limited civil case, but the plaintiff did not bring the action as a limited civil case, Code of Civil Procedure section 1033, subdivision (a) grants the trial court discretion to deny the plaintiff's recovery of litigation costs, even if the plaintiff would otherwise have been entitled to recover those costs as a matter of right. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 983.) Thus, even if defendants had not recovered declaratory relief, and plaintiffs' net monetary recovery had entitled them to recover their costs as a matter of right, the trial court would *still* have had discretion to deny them recovery of litigation costs—and hence attorney fees—because the judgment recovered was below the jurisdictional minimum. (See *ibid*.)

be considered to have prevailed. "Whether we would have made the same determination in the first instance is immaterial. As long as the contested decision is supported by reasonable inferences, we have no authority to substitute our judgment for that of the trial court." (*Lincoln v. Schurgin, supra*, 39 Cal.App.4th at pp. 105-106.) We cannot say the trial court abused its discretion.[12]

DISPOSITION

The judgments and postjudgment orders are affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.

[12] Defendants make a cursory argument that they are entitled to attorney fees on appeal if this court affirms the judgment. Defendants appear to reason that they are entitled to their fees on appeal because they were entitled to a fee award in the court below. If that is their reasoning, it fails because we hold the trial court did not abuse its discretion in denying defendants their attorney fees. In any event, the two brief paragraphs defendants offer in support of this contention do not sufficiently explain why defendants should receive an award of fees and costs on appeal. (See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287 ["we may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt"].)